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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

HELEN EHRET BACH, EUGENE G. BACH, III and JANET B. LASHLEY,

Petitioners

v.

TRIDENT STEAMSHIP COMPANY, INC., KAISER ALUMINUM AND CHEMICAL CORPORATION,

Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF OF RESPONDENTS, TRIDENT STEAMSHIP COMPANY, INC. AND KAISER ALUMINUM AND CHEMICAL CORPORATION, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Respondents, Trident Steamship Company and Kaiser Aluminum and Chemical Corporation, disagree with the statement of the question presented by Petitioners. The questions presented for consideration are:

1. Whether the United States Court of Appeals for the Fifth Circuit, on remand from this Court, correctly determined, in accordance with *McDermott International, Inc. v. Wilander*, —— U.S. ——, 111 S.Ct. 807, 112 L.Ed.2d 866 (1991), that petitioners' decedent, a land-based, independent contractor who served as a river port pilot, was not a "seaman" entitled to state a claim under the Jones Act, 46 U.S.C. app. § 688?

2. Whether the seaman's status question raised by petitioners is inappropriate for review in this case in light of the uncontradicted evidence demonstrating the absence of causation between respondents' asserted conduct and pilot Bach's death, whether or not Bach was a seaman?

LIST OF INTERESTED PERSONS AND RULE 29.1 LIST

The parties to the proceeding below were petitioners/plaintiffs, Helen Ehret Bach, Eugene G. Bach, III, Janet Bach Lashley, and respondents/defendants, Trident Steamship Company, Inc. and Kaiser Aluminum and Chemical Corporation. Although petitioners named the vessel, the M/V JAYMAT TRIDENT, *in rem*, as a defendant and a respondent, petitioners never seized the vessel. Thus, the vessel was not a party in the courts below and is not a party before this Court.

Pursuant to this Court's Rule 29.1, respondent, Trident Steamship Company, Inc., certifies that it is owned by Standard Shipping, Inc. and various individual owners. Trident has no subsidiaries that are not wholly owned.

Pursuant to Rule 29.1, respondent, Kaiser Aluminum and Chemical Corporation, certifies that it is owned by KLU Holdings, Inc. and Brown Brothers, Harriman & Co. Its subsidiaries that are not wholly owned are as follows: Anglesey Aluminum Limited, Bauxita Da Amazonia Limitada, Delta Holdings, Inc., Hopewell International Insurance, Ltd., Kaiser Jamaica Bauxite Company, Oakland City Center Hotel Company, Inc., Queensland Alumina Finance N.V., Queensland Alumina Holdings N.V., Queensland Alumina Limited, Queensland Alumina Security Corporation, Second Queensland Alumina Security Corporation, Tortuga Casualty Company, United Insurance Company, and Volta Aluminum Company, Limited.

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BRIEF OF RESPONDENTS, TRIDENT STEAMSHIP COMPANY, INC. AND KAISER ALUMINUM AND CHEMICAL CORPORATION, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondents, Trident Steamship Company, Inc. and Kaiser Aluminum and Chemical Corporation, submit that there is no basis for granting a writ of certiorari in this case. The United States Court of Appeals for the Fifth Circuit, as ordered by this Court's mandate in No. 90-1578, reconsidered its opinion in light of *McDermott International, Inc. v. Wilander*, —— U.S. ——, 111 S.Ct. 807, 112 L.Ed.2d 866 (1991). The Fifth Circuit correctly determined that its prior decision was consistent with *Wilander* and that decedent Bach, a land-based river port pilot with no employment relationship with any vessel owner, could not qualify as a seaman under the

Jones Act, 46 U.S.C. app. § 688. *Bach v. Trident Steamship Co., Inc.* [*Bach II*], 947 F.2d 1290 (5th Cir. 1991); Petitioners' Appendix, A-2.

Even assuming that a river port pilot's status as a seaman under the Jones Act presented a reviewable question, the undisputed facts render review inappropriate in this case. Petitioners' inability to prove their case by a preponderance of the evidence rendered summary judgment appropriate whether or not decedent was a seaman, thus negating any legal issue that this case may otherwise present.

STATEMENT OF THE CASE

While petitioners have accurately set forth a summary of the proceedings in this case, Petition 3-5, their factual statement excludes many undisputed, substantive facts that are important to evaluation of the petition. The opinions below (*see* Petitioners' Appendix, A-11 to A-42, A-44 to A-59), while referencing most of the relevant facts, do so throughout the text of several opinions. Thus, respondents restate the relevant facts as follows:

On December 26, 1986, petitioners' decedent, Eugene G. Bach, a Mississippi River port pilot (and not a "bar pilot" as petitioners erroneously label him), collapsed and died aboard the M/V JAYMAT TRIDENT shortly after he arrived on the deck of that vessel. Although Bach's death resulted from a serious occlusive coronary artery disease, commonly known as "hardening of the arteries," and could have as easily occurred in his living room as on the vessel, petitioners filed this lawsuit seeking to hold respondents responsible for his death.

A. The Practice of Pilotage under Louisiana Law

Under Louisiana law, "river port pilots" have the exclusive right to provide pilotage services to most vessels on the Mississippi River between New Orleans and Pilottown (at the mouth of the river). *See* La. Rev. Stat.

34:996.[1] The fees charged by the river port pilots are set by regulation. *See* La. Rev. Stat. 34:997, 1121(A), 1122(A)(1)(a). Masters, owners, and agents of vessels traversing the Mississippi River between New Orleans and Pilottown are required by law to hire a river port pilot or face severe civil and criminal penalties for failing to do so. *See* La. Rev. Stat. 34:1002, 1002.1, 1009. Louisiana law authorizes the river port pilots to form an association. *See* La. R.S. 34:995. As allowed by Louisiana law, the river port pilots have formed and operate out of the Crescent River Port Pilots Association. The pilots' association, as was done in this case, assigns one of its member pilots to a vessel when it receives a call from a vessel's master, owner, or agent. A pilot boarding boat then transports the assigned pilot to the oceangoing vessel, whereupon the pilot boards the vessel and then assists in navigating it between the aforementioned points.

Two of the petitioners in this case, Eugene G. Bach, III, decedent's son and a river port pilot like his father, and Mrs. Helen Bach, decedent's wife, testified as to the nature of pilotage as practiced by the river port pilots. Their testimony indicates that pilots are independent contractors—not employees of any particular vessel owner—and are not part of the crew of any vessel. River port pilots merely sail with a vessel between two points in the Mississippi River. River port pilots have no regular, continuous, or permanent connection with any vessel and leave the vessel before it reaches the Gulf of Mexico. The IRS Form K-1 forwarded to decedent's estate by the pilots' association indicated that the pilots' association acts as a partnership in passing the income it collects from pilotage fees down to its members. Decedent Bach was a member of the association through his personal corporation. Thus, the pilots' association forwarded the

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[1] The Louisiana statutes regarding pilotage cited in this opposition are reproduced in the appendix to this writ opposition at A-1 to A-3.

IRS Form K-1 reflecting decedent's corporation's share of the pilotage income to his personal corporation. In turn, decedent's personal corporation employed decedent.

B. The Underlying Facts

One of the normal duties of a river pilot is to reach the deck of the vessel to which he is assigned by climbing a rope-railed, wooden rung pilot ladder. Once the pilot reaches the deck via the pilot ladder, his normal duties include ascending several flights of stairs to reach the ship's bridge or wheelhouse. Decedent Bach, 61 years old at the time of his death, had been performing such duties for over 30 years.

Early on the morning of December 26, 1986, a pilot boat transported Bach to the M/V JAYMAT TRIDENT, an ocean-going vessel headed down the Mississippi River to the Gulf of Mexico. Bach stepped onto the pilot ladder from a platform on the top of the pilot boat and climbed the pilot ladder approximately 21 feet to the ship's deck.[2] He then ascended four flights of stairs from the deck to the vessel's bridge. According to the vessel's deck log, Bach reached the wheelhouse on the ship's bridge at 2:30 a.m. and relieved Pilot Taylor, the Baton Rouge to New Orleans pilot. The record is devoid of any evidence indicating that Bach suffered any injury or had any difficulty reaching the bridge.

Two minutes later, at 2:32 a.m. according to the vessel's log, Bach unexpectedly collapsed and became unconscious while the vessel was in navigation and proceeding down the Mississippi River. The vessel's quartermaster

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[2] The summary judgment evidence indicated that the freeboard of the M/V JAYMAT TRIDENT, *i.e.*, the distance between the vessel's deck and the surface of the water, was no more than 32.36 feet, and probably was somewhat less. The pilot boat platform from which Bach boarded the vessel was 11 feet, 1½ inches above the water line. Thus, Bach's climb on the pilot ladder was no more than approximately 21 feet.

called the vessel's captain, who was standing on the port side bridge wing waiting for Pilot Taylor to descend the pilot ladder. The captain ran to the wheelhouse, where he saw Bach lying on the floor. He ran back to the port wing and yelled for Pilot Taylor to return to the bridge.

Pilot Taylor returned to the bridge and took control of the vessel, which was in an emergency situation. At the request of the vessel's captain, Pilot Taylor called for emergency medical assistance and brought the vessel to anchor. Although Pilot Taylor called for medical assistance shortly after his return to the bridge at 2:34 a.m., emergency medical personnel did not arrive until some time after 3:00 a.m. (the deck log lists the time of arrival as 3:30 a.m.). While the vessel was being maneuvered to anchor, a crewmember checked Bach and found no pulse. When paramedics arrived, they checked Bach and also found no pulse. Bach was placed on a stretcher and transported to shore.

C. The Medical Evidence

While petitioners seek to hold respondents responsible for Bach's death, the uncontradicted medical evidence, including the deposition testimony of petitioners' own medical expert, demonstrates that Bach had severe "hardening of the arteries" and would have died regardless of the vessel's actions.

Decedent was transferred from the vessel to the Orleans Parish Coroner's Office, where an autopsy was performed. The Coroner classified decedent's death as "natural," resulting from "severe stenotic calcific coronary atherosclerosis as well as other conditions."

Petitioners' medical expert, Dr. John H. Phillips, the head of cardiology at Tulane University Medical Center, testified by deposition that decedent had occlusive coronary artery disease, commonly known as "hardening of the arteries." Decedent had only "pinpoint lumens" in his arteries, meaning that his arteries were 90 to 99 percent

blocked. Dr. Phillips classified decedent's condition at the time of his death as extremely serious. He testified that had he examined decedent before his death, he would have instructed him to stop working and to refrain from physical activity and would have scheduled him for immediate coronary bypass surgery.

Dr. Phillips explained that Bach's death resulted when the restricted blood flow through the clogged arteries caused "ventricular fibrillation," that is, "where the electrical activity of the heart, particularly in the ventricles, is so distorted that there is no effective cardiac contraction." As a result, the heart stops pumping. After ventricular fibrillation is present for a few minutes, in some cases only a few seconds, it can only be reversed, and the person can only be saved, by electrical shock treatment using a special medical device known as a defibrillator. Dr. Phillips testified that in more than 90 percent, and probably more than 95 percent of the cases where ventricular fibrillation sets in, a defibrillator is needed to save the party. Dr. Phillips stated that defibrillators are found primarily in hospitals, in some doctors' offices, and possibly in some emergency medical units, and that they are not likely to be equipment aboard an ocean-going cargo vessel.[3]

Dr. Phillips further testified that the more advanced the condition, the less likely the person's chances of survival, even if CPR and electrical defibrillation had been promptly administered. He opined that the overwhelming majority of persons with decedent's condition would not have survived, even had CPR and electrical defibrillation been promptly administered. Outside a hospital Coronary Care Unit, decedent's chances of survival were extremely slim.

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[3] Furthermore, many emergency medical units are not equipped with defibrillators. The emergency medical unit that responded to the ship's call for help was not so equipped.

Dr. Phillips also testified that while decedent's activity in climbing aboard the vessel *may* have been a factor in his death, he could not state that decedent would not have collapsed and died if he had not engaged in that activity. Nor could he state that decedent would not have died had he climbed an accommodation staircase rather than a pilot's ladder. Dr. Phillips opined that someone with decedent's severe heart condition could have suffered a heart attack while sleeping, sitting, watching television, or walking; there is no standard precipitating event. He testified that just as many heart attacks occur at rest as during exercise, maybe more.

Dr. Phillips assessed Bach's chances of dying, even if CPR *and electrical defibrillation* had been promptly administered, at 85 percent *or somewhat greater*, with his chances of survival possibly in the 0 to 10 percent range.

D. The Proceedings

The sole question remaining in this case is whether the courts below correctly dismissed petitioners' Jones Act claim on grounds that decedent was not a Jones Act seaman. The district court granted the vessel's summary judgment motion dismissing petitioners' Jones Act claim, finding that decedent had no permanent connection with the JAYMAT TRIDENT or with any definable fleet of vessels associated with either Trident or Kaiser. *See* Petitioners' Appendix, A-39 through A-41.

On January 10, 1991, the Fifth Circuit entered its opinion and judgment affirming the district court's judgment. *Bach v. Trident Steamship Co., Inc.* [*Bach I*], 920 F.2d 322 (5th Cir. 1991); Petitioners' Appendix, A-11 to A-35. The Court of Appeals, employing its longstanding test first enunciated in *Offshore Co. v. Robison*, 266 F.2d 769 (5th Cir. 1959), found that decedent, a land-based river pilot, was not a seaman. The court found that while decedent's job as a river pilot contributed to the function or mission of a vessel, decedent had no permanent connec-

tion to the vessel or an identifiable fleet of vessels as required to be a seaman. 920 F.2d at 324-26; Petitioners' Appendix, A-12 to A-17.

Petitioners then filed their first writ of certiorari with this Court. In that proceeding, this Court granted a writ and remanded the case for further consideration in light of *McDermott International, Inc. v. Wilander*, 111 S.Ct. 807 (1991). *Bach v. Trident Steamship Co., Inc.*, 111 S.Ct. 2253 (1991); Petitioners' Appendix, A-10. The Fifth Circuit, as ordered by this Court, thereafter reconsidered its decision in light of *Wilander* and concluded that that decision did not affect its conclusion that pilot Bach was not a seaman. *Bach v. Trident S.S. Co.* [*Bach II*], 947 F.2d 1290, 1291 (5th Cir. 1991); Petitioners' Appendix, 11.

Petitioners now file this second petition.

REASONS FOR DENYING THE WRIT

I. THE DECISION OF THE FIFTH CIRCUIT IS CONSISTENT WITH THIS COURT'S *WILANDER* DECISION

Petitioners contend that the Fifth Circuit on remand erroneously applied its *Offshore v. Robison* test in determining whether pilot Bach was a seaman. Petitioners argue that *Wilander* overruled *Robison* and that the appropriate question under *Wilander* is whether the party claiming seaman status would have been a seaman before the passage of the Jones Act in 1920. Petition, 7-8. They assert that the pre-1920 jurisprudence clearly considered pilots as seamen, and thus, pilots should be considered seamen under the Jones Act. Petition, 8-13.

Petitioners further argue that pilot Bach must be a Jones Act seaman, because he cannot be a worker covered under the Longshore and Harbor Workers Compensation Act ("LHWCA"). They contend that a 1927 opinion of the United States Employees Compensation Commission,

i.e., the agency then charged with administering the LHWCA, had opined that a river pilot is included within the "master or member of a crew" exclusion to LHWCA coverage. Referencing this Court's statement in *Wilander* that the Jones Act and the LHWCA are mutually exclusive, petitioners contend that the administrative interpretation holding a pilot within the "master or member of a crew" exclusion from LHWCA coverage necessarily renders pilots as "seamen" under the Jones Act. Petition, 13-15. Petitioners contend that the 1972 Amendments to the LHWCA did not alter the "master or member of a crew" exclusion from LHWCA coverage, and therefore, did not affect his status via the Jones Act and the LHWCA. Petition, 15-17.

In concluding, petitioners cite to a district court case, *Evans v. United Arab Shipping Co.*, 767 F.Supp. 1284 (D.N.J. 1991), in which a pilot was held to be a seaman. Petition, 18.

Initially, petitioners incorrectly assert that *Wilander* overruled the Fifth Circuit's longstanding *Robison* seaman's status test. In *Wilander*, a Fifth Circuit case like the present case, that court of appeals applied its *Robison* test in finding that Wilander, an oilfield worker assigned to a paint boat in the Persian Gulf, was a seaman. Under the *Robison* test, a person is considered a seaman if: (1) he or she is permanently attached to or performs a substantial part of his or her work aboard a single vessel or an identifiable fleet of vessels *and* (2) if the person's employment contributes to the function or mission of the vessel or an identifiable fleet of vessels. *Wilander*, 111 S.Ct. at 809. The sole issue reviewed by this Court in *Wilander* involved the second part of the *Robison* test. McDermott, the petitioner in *Wilander*, argued that a mere contribution to the function or mission of the vessel did not render the party a seaman. McDermott argued that the correct seaman's status test was the stricter test applied by the Seventh Circuit in *Johnson v. John F.*

Beasley Construction Co., 742 F.2d 1054 (7th Cir. 1984), *cert. denied*, 469 U.S. 1211 (1985). *Wilander*, 111 S.Ct. at 809-10. Under the *Johnson* test, seaman's status depends on whether a party's employment makes "a significant contribution to the maintenance, operation or welfare of the *transportation function* of the vessel," and not merely the general function or mission of the vessel. *Wilander*, 111 S.Ct. at 810, *quoting Johnson*, 742 F.2d at 1063 (emphasis supplied).

As the Fifth Circuit correctly stated in its decision on remand, *Bach II*, 947 F.2d at 1291; Petitioners' Appendix, A-2, the specific question addressed in *Wilander* was "whether one must aid in the navigation of a vessel in order to qualify as a 'seaman' under the Jones Act." *Wilander*, 111 S.Ct. 809. *Wilander* did not question the requirement that seaman's status requires a permanent, *employment-related* connection to a vessel or fleet of vessels. After weighing the conflicting circuit court jurisprudence regarding this question, this Court agreed with the Fifth Circuit that seaman's status does not require that the person claiming seaman's status must contribute to the *transportation* function of the vessel; he or she must only have contributed to the overall function *or mission* of the vessel. 111 S.Ct. at 817. Thus, this Court did not, as petitioners assert, overrule the *Robison* test. Insofar as the Court considered the *Robison* decision, the Court *affirmed* that definition of seaman's status.

Furthermore, while this Court in *Wilander* looked to the pre-1920 definition of seaman and the LHWCA "master or member of a crew" exclusion in evaluating whether a person claiming seaman's status must assist with the *transportation* function of the vessel, this Court did not blindly hold, as petitioners suggest, that all persons casually labeled by the courts as seamen before 1920 necessarily are seamen under the Jones Act. The Court recognized that the LHWCA altered the definition of a "seaman" by defining out of the scope of that term land-based maritime workers. *Wilander*, 111 S.Ct. at 817. The purpose

of the LHWCA was to remove land-based maritime workers from the scope of Jones Act coverage while leaving as seamen sea-based maritime employees. *Id.*, 111 S.Ct. at 813-14. Thus, the phrase, "master or member of a crew," as used in the LHWCA exemption from coverage "restates who a 'seaman' under the Jones Act is supposed to be: a *sea*-based maritime *employee*." *Id.*, 111 S.Ct. at 814 (emphasis supplied).

The Court also recognized that an employer/employee relationship is a necessary prerequisite to Jones Act seaman's status. The plaintiff must owe his or her allegiance to a vessel at sea—*not to a land-based employer*. *Id.*, 111 S.Ct. at 813-14, 817. "The key to seaman's status is *employment*-related connection to a vessel in navigation." *Id.*, 111 S.Ct. at 817 (emphasis supplied).

Thus, in holding that a seaman (1) must be sea-based and not land-based, (2) must have an employment-related connection to a vessel, and (3) must aid in the function of the vessel, this Court in *Wilander* identified the same factors identified by the Fifth Circuit in *Robison*: a seaman must have a permanent attachment to a vessel or perform substantial work aboard a vessel (or, at the very least, aboard an identifiable fleet of vessels). *See Robison*, 266 F.2d at 779. The Court also recognized that whether a particular individual is a seaman depends on the facts of each case, and not on generic classifications. 111 S.Ct. at 818.

Furthermore, in *Southwest Marine, Inc. v. Gizoni*, 112 S.Ct. 486 (1991), a case understandably ignored by petitioners, the Court, quoting from *Wilander*, again found that "[t]he key to seaman status is employment-related connection to a vessel in navigation." 112 S.Ct. at 492. The Court rejected the contention that a person's classification determines coverage under the Jones Act and LHWCA. *Id.* Each case requires an independent inquiry into whether the plaintiff has an "employment-related connection to a vessel in navigation." *Id.*

While the circuits may have disagreed before *Wilander* and *Gizoni* regarding the "aid in the transportation" requirement, they had agreed that seaman's status is dependent on the plaintiff having an employment-related connection to a vessel in navigation. Consistent with *Wilander*, *Gizoni*, and the Fifth Circuit *Robison* test, all other circuits that have considered the issue have held that, for a party to be considered a seaman, the party must have such a connection with a vessel. *E.g.*, *Stafford v. Perini Corp.*, 475 F.2d 507, 510-11 (1st Cir. 1973); *Klarman v. Santini*, 503 F.2d 29, 33 (2d Cir. 1974), *cert. denied sub nom. Connecticut v. Klarman*, 419 U.S. 1110 (1975); *Griffith v. Wheeling Pittsburgh Steel Corp.*, 521 F.2d 31, 36 (3d Cir. 1975), *cert. denied*, 423 U.S. 1054 (1976); *Whittington v. Sewer Construction Co., Inc.*, 541 F.2d 427, 434 (4th Cir. 1976); *Petersen v. Chesapeake & Ohio Ry. Co.*, 784 F.2d 732, 737 (6th Cir. 1986); *Johnson v. John F. Beasley Construction Co.*, 742 F.2d 1054, 1062-63 (7th Cir. 1984), *cert. denied*, 469 U.S. 1211 (1985); *Slatton v. Martin K. Eby Construction Co., Inc.*, 506 F.2d 505, 510 (8th Cir. 1974), *cert. denied*, 421 U.S. 931 (1975); *Stanfield v. Shellmaker, Inc.*, 869 F.2d 521, 523 (9th Cir. 1989); *Hurst v. Pilings & Structures, Inc.*, 896 F.2d 504, 505 (11th Cir. 1990).

There is no basis for granting a writ in this case. In reconsidering its original decision on remand, the Fifth Circuit correctly determined that the principles announced in *Wilander* required it to reinstate its original opinion. *Bach II*, 947 F.2d at 1291. The Fifth Circuit's finding that decedent was not a seaman was based on the uniformly agreed-upon requirement that seaman's status requires that the party have a permanent, *employment*-related connection to a vessel, or at the very least, with an identifiable fleet of vessels. As the Fifth Circuit stated, "Bach's survivors do not seriously argue that he was attached to or did substantial work on board the M/V JAYMAT TRIDENT. The record clearly reveals that he ful-

filled neither requirement." *Bach I*, 920 F.2d at 324; Petitioners' Appendix, A-13.

The *uncontradicted* evidence in this case supports the Fifth Circuit's conclusion. Decedent, a *compulsory* pilot, was not aboard the vessel as a matter of the vessel owner's choice. Having been dispatched by his pilots' association, he was aboard because Louisiana law requires a pilot to be aboard and severely penalizes any vessel owner who fails to use a river port pilot. La. Rev. Stat. §§ 34:1002, 1002.1, 1009. Decedent was not an employee of the vessel or its owner or charterer. He was an employee of his personal corporation. Two of the three petitioners in this case, decedent's widow, Helen Bach, and decedent's son, Eugene G. Bach, III (who, like his father, is a river pilot), testified in their respective depositions that decedent had no permanent connection with any vessel. Decedent's son testified that river port pilots merely assist a vessel between two points in the Mississippi River. He further testified that river port pilots have no regular, continuous, or permanent connection with any vessel, and that they leave the vessel before it reaches the Gulf of Mexico. Decedent's wife *agreed* that river port pilots *are not members of any vessel's crew*. There is no evidence in this case that decedent had any employment-related connection with any vessel owner or that he had any permanent connection with any identifiable fleet of vessels owned or controlled by respondents. Decedent simply engaged in river port pilotage as an independent contractor on random vessels as assigned by the pilots' association.[4]

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[4] This Court has recognized the independence of pilots and their want of allegiance to any employer:

> Pilots hold a unique position in the maritime world and have been regulated extensively both by the States and Federal Government. Some state laws make them public officers, chiefly responsible to the State, not to any private employer. Under law and custom they have an independence wholly incompatible with the general obligations of obedience normally owed by an

Thus, petitioners' own testimony verifies the correctness of the Fifth Circuit's decision. Decedent *cannot* be a seaman because petitioners' own testimony conclusively established that he lacked the permanent, employment-related connection to a vessel recognized as necessary by this Court and by every circuit that has addressed the issue. Because, under the uncontested facts, petitioners could not meet their burden of proof regarding a material element of seaman's status, the Fifth Circuit correctly sustained the dismissal of petitioners' Jones Act claim. *E.g., Celotex Corporation v. Catrett*, 477 U.S. 317, 322-23 (1986).

Nor do the authorities cited by petitioners provide any basis for finding pilot Bach a seaman. Neither *United States v. Thompson*, 28 Fed.Cas. 102 (No. 16,492) (C.C.D. Mass. 1832), *Pacific Mail Steamship Co. v. Joliffe*, 69 U.S. 450 (1865), *The China*, 74 U.S. 53 (1869), nor *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299 (1852) contains any analysis of the requirements for seaman's status, even outside the context of the Jones Act and the LHWCA.[5] The remaining cases cited by peti-

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> employee to his employer. Their fees are fixed by law and their charges must not be discriminatory. As a rule no employer, no person can tell them how to perform their pilotage duties.

Bisso v. Inland Waterways Corp., 349 U.S. 85, 93-94 (1955) (footnotes omitted).

[5] *Cooley* questioned the constitutionality of Pennsylvania's statutory compulsory pilotage scheme for the Port of Philadelphia. *Thompson* involved a criminal mutiny charge against a crewmember. *Joliffe* questioned the validity of the compulsory pilotage regulations governing the Port of San Francisco. *The China* questioned whether a vessel *in rem* and a vessel owner *in personam* were responsible for the collision damages caused by a pilot's negligence.

If relevant at all, *The China* supports respondents' position. While the vessel *in rem* was held to be responsible for the pilot's negligence, the ship owner, having not voluntarily chosen the *compulsory* pilot as its servant, was held to have no personal responsibility for the pilot's negligence. *See also* T.J. Schoenbaum, ADMIRALTY AND MARITIME LAW § 12-5 at 438-39 (1987).

tioners involved "pilots," who, unlike pilot Bach, had a long-term employment relationship with a single vessel and vessel owner. *The Lud Keefer*, 51 Fed. 44 (3d Cir. 1892) (which involved a pilot hired to assist a vessel on a voyage from Pittsburgh to Louisville and back); *The Mary Elizabeth*, 24 Fed. 397 (C.C.S.D.Ala. 1885) (which involved pilots hired on a vessel for terms of four and six months); *Wilson v. The Ohio*, 30 Fed.Cas. 149 (No. 17,825) (E.D.Pa. 1834) (which involved a suit by the pilot, the firemen and the deckhands of the named vessel, which navigated the Delaware River between Philadelphia and the State of Delaware). These "pilots," unlike Bach, would have met the *Wilander-Gizoni* requirement of an "*employment*-related connection to a vessel in navigation." *Wilander*, 111 S.Ct. at 817; *Gizoni*, 112 S.Ct. at 492. Thus, contrary to petitioners' assertion, the historical jurisprudence on which they rely *does not* support the proposition that port pilots, like pilot Bach, who are land-based, independent contractors who board numerous vessels for a few hours at most, are "seamen."

Also, the 1927 LHWCA opinion upon which petitioners rely, Longshoremen's Act, Opinion No. 22 (1927), *reproduced at* 1928 A.M.C. 263-64, provides no basis for granting a writ. In that opinion, the United States Employees Compensation Committee relied on a number of 19th Century cases opining that a pilot was within the "master or member of a crew" exception to LHWCA coverage. *Id.*

While administrative determinations *sometimes* are entitled to deference, such is not always the case. Statutory interpretation must begin and end with the plain language of the statute unless the statutory language is unclear. *See Blum v. Stenson*, 465 U.S. 886, 896 (1984). Furthermore, administrative interpretations are not entitled to deference when a sound judicial analysis finds a contrary reading of the statute as supported by statutory language, purpose, and history:

> [T]he "deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia which re-

> sults in the unauthorized assumption by an agency of major policy decisions properly made by Congress." . . . [The courts] must not "rubber stamp . . . administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute."

Bureau of Alcohol, Tobacco and Firearms v. Federal Labor Relations Authority, 464 U.S. 89, 97 (1983), *quoting American Ship Building Co. v. National Labor Relations Board*, 380 U.S. 300, 318 (1965), and *National Labor Relations Board v. Brown*, 380 U.S. 278, 291-92 (1965).

This Court plainly held in *Wilander* and *Gizoni* that an employment-related relationship is a mandatory prerequisite for a person to be a seaman under the Jones Act. All of the authorities cited in this 1927 administrative opinion predate both the Jones Act and the LHWCA. None of these cases purports to address whether a port pilot has the necessary *employment* relationship to be considered a seaman for purposes of personal injury or death benefit recovery. Two of the cases, *The China*, discussed above, and *Camp v. The Marcellus*, 4 Fed.Cas. 1141 (No. 2,347) (D.Mass. 1860), *aff'd*, 66 U.S. 414 (1862), discussed the liability of a vessel and its owner for collision damages. The remaining two cases discussed in this administrative opinion, *United States v. Lynch*, 26 Fed.Cas. 1033 (No. 15,648) (S.D.N.Y. 1843), and *United States v. Forbes*, 25 Fed.Cas. 1141 (No. 15,129) (E.D. Pa. 1845), dealt with the pilot's authority in the context of jury charges given in criminal cases wherein seamen were charged with revolt and mutiny for failure to obey a pilot's orders.

Thus, the authority cited in this dated, LHWCA administrative opinion does not support the conclusion that river port pilots have the required *employment* relationship to be considered as Jones Act seamen. Because this opinion did not consider the mandatory *employment* requirement of Jones Act seaman's status, it is plainly

inconsistent with the Jones Act and the LHWCA. The courts are not bound to follow such an unsupported administrative interpretation that is in clear derogation of a statutory requirement.

Perhaps more importantly, this administrative opinion is not entitled to judicial deference because it directly conflicts with the Jones Act as interpreted in *Wilander* and *Gizoni*. *Wilander* and, more particularly, *Gizoni* held that whether a particular person is covered by the Jones Act or the LHWCA depends on the facts and circumstances peculiar to each individual case; generic classifications, such as "ship repairman" or "pilot," are not conclusive as to whether a person is covered by one act or the other. *Wilander*, 111 S.Ct. at 818; *Gizoni*, 112 S.Ct. at 498. Thus, petitioners' interpretation of this administrative opinion—that all persons generically labeled as "pilots" are automatically seamen—directly conflicts with the fact-intensive, case-by-case determination that *Wilander* and *Gizoni* require. Under the undisputed facts of this case, discussed above, pilot Bach, a land-based, independent contractor who had no employment relationship with any vessel, was not a seaman. Bach boarded vessels owned by many different owners for only a few hours at a time before he returned ashore. Under *Wilander* and *Gizoni*, the LHWCA, not the Jones Act, covers such land-based maritime workers who owe no allegiance to any vessel. *Wilander*, 111 S.Ct. at 813-14; *Gizoni*, 112 S.Ct. at 492.

Also, sound policy reasons dictate that this Court make no class-based exceptions to the fact-intensive seaman's status inquiry mandated in *Wilander* and *Gizoni*. As the Fifth Circuit correctly noted, several classes of workers who more clearly face the perils of the open sea than did decedent have been denied status as seamen, because they did not meet the seaman's status requirements. *Bach I*, 920 F.2d at 325. Workers, such as those who navigate vessels on the open seas on sea trials, who work aboard

fixed structures on the open sea, and who service vessels at sea owned by various owners, have not been considered seamen, because they lack the permanent, *employment*-related connection to a vessel that seaman's status requires. *Id.* Making a class-based exception to the employment requirement for all port pilots would not only ignore the fact-intensive nature of this status determination required by *Wilander* and *Gizoni* with regard to pilots, but would open the door to similar class-based exceptions for other classifications of offshore and inland maritime workers who also lack an employment-related connection to a vessel. To make the classification-based exception urged by petitioners is to "muddy the waters" clarified by *Wilander* and *Gizoni* as to the requirements of seaman's status.

Finally, petitioners' reliance on *Evans v. United Arab Shipping Co.*, 767 F.Supp. 1284 (D.N.J. 1991) provides no basis for granting a writ. The *Evans* court held that a port pilot, like pilot Bach, was a seaman under the Jones Act. However, in reaching that conclusion, the district court supported its conclusion with the same unmeritorious arguments asserted by petitioners in the instant case. While paying only lip-service to the particular facts of the case, 767 F.Supp. at 1291, the court relied heavily on the pre-Jones Act jurisprudence and the 1927 LHWCA administrative opinion generically classifying pilots as seamen. 767 F.Supp. at 1289-91. The court did not examine the relationship between Evans and the vessel owner; it merely assumed that since the ship owner hired Evans through his pilots' association, an employment relationship must have existed. 767 F.Supp. at 1291. However, *Wilander* and *Gizoni* make clear that seaman's status requires more than a *contractual* relationship for seaman's status; it requires that persons seeking seaman's status have an "*employment*-related" connection with the vessel. *Wilander*, 111 S.Ct. at 817; *Gizoni*, 112 S.Ct. at 492.

Furthermore, whether or not Evans demonstrated the necessary "employment-related" connection—and whether

that decision is right or wrong under the particular facts of that case—makes no difference to the present case. In the instant case, the *undisputed* facts are that pilot Bach was employed by his own corporation—not the vessel owner—and that his pilotage corporation was an independent contractor—not an employee—that supplied pilotage services to vessels. The Fifth Circuit correctly concluded that under the particular facts of this case, Bach was not a seaman.

In *Wilander* and *Gizoni*, this Court established the rules for determining whether a person is a seaman entitled to sue under the Jones Act. The decision of the Fifth Circuit is consistent with the principles announced in those cases. This case presents no question for review, and the Court should deny petitioners' request for a writ of certiorari.

II. RESPONDENTS' ENTITLEMENT TO SUMMARY JUDGMENT ON CAUSATION AND BURDEN OF PROOF GROUNDS RENDERS THIS CASE INAPPROPRIATE FOR REVIEW

Even if the question asserted—whether a pilot can be a seaman under the Jones Act—were appropriate for review, the undisputed facts render this case an inappropriate vehicle for considering the question. Respondents were entitled to summary judgment whether or not decedent was a seaman.

Whether a plaintiff's claim is under the Jones Act or the general maritime law, a plaintiff seeking recovery must prove *by a preponderance of the evidence* that the fault of the defendant caused the plaintiff's purported injury. *E.g.*, *Diebold v. Moore McCormack Bulk Transport Lines*, 805 F.2d 55, 58 (2d Cir. 1986) (recognizing that plaintiff must prove the elements of his Jones Act case by a preponderance of the evidence); *Snyder v. Whittaker Corp.*, 839 F.2d 1085, 1092 (5th Cir. 1988) (noting that both under Texas law and the Jones Act, plaintiff must prove his case by a preponderance of the

evidence); *Litherland v. Petrolane Offshore Const. Services*, 546 F.2d 129, 132 (5th Cir. 1977) (affirming a jury instruction requiring plaintiff to prove the elements of his Jones Act case by a preponderance of the evidence); *Matter of Hechinger*, 890 F.2d 202, 208 (9th Cir. 1989), *cert. denied sub nom. Caskie v. Hechinger*, 111 S.Ct. 136 (1990) (citing *Litherland* and recognizing that plaintiff's burden under the Jones Act is to prove his case by a preponderance of the evidence).

Summary judgment is appropriate where the uncontradicted evidence demonstrates that plaintiff is unable to prove his case by a preponderance of the evidence. *Celotex, cited above*, 477 U.S. at 322-23. The mere existence of a "metaphysical doubt" as to material facts does not preclude summary judgment. *Matsushita Electric Industrial Co. Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). A dispute is not genuine so as to render summary judgment inappropriate unless the evidence is such that a reasonable fact finder could return a verdict on the issue for either party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-50 (1986).

In this case, petitioners alleged that defendants were negligent in two respects: (1) in failing to administer CPR to decedent immediately upon his collapse, and (2) in allegedly requiring him to climb a pilot ladder for a distance greater than allowed by applicable regulations. However, the undisputed evidence, summarized above, plainly demonstrated that petitioners could not meet their burden of proof on either claim. Petitioners' own expert, Dr. John H. Phillips, the head of cardiology at Tulane University Medical Center, testified that the cause of decedent's death was his hardening of the arteries—which were 90 to 99 percent blocked—not any negligence of the vessel. Dr. Phillips placed decedent's chances of dying from his heart condition, even if CPR and electrical defibrillation had been administered immediately, as *greater than 85 percent, with his chances of survival possibly in*

the 0 to 10 percent range. Dr. Phillips further testified that decedent's chances of dying were just as likely whether he was climbing aboard a ship, sleeping, or sitting in his living room while watching television. Thus, petitioners could not meet their burden of proving by a preponderance of the evidence that any alleged negligence caused decedent's death.

Furthermore, petitioners' pilot ladder claim totally lacked merit, because the distance decedent climbed up the ladder was well within the distance allowed by applicable maritime regulations. *See Bach I*, 920 F.2d at 327; Petitioners' Appendix, A-18 to A-19.

Because respondents were entitled to summary judgment regardless whether pilot Bach was a seaman, this case is an inappropriate one to address the seaman's status question urged by petitioners.

CONCLUSION

For the reasons discussed above, respondents, Trident Steamship Company, Inc. and Kaiser Aluminum and Chemical Corporation, respectfully submit that this Court should deny petitioners' petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX

R.S. 34:995. Association of river port pilots

The said river port pilots may form themselves into an association as to them may seem fit, not in conflict with law, or with the rules and regulations of the river port pilot commissioners, but nothing herein shall affect any association presently existing.

R.S. 34:996. Operating territory

A. The river port pilots shall have the exclusive right to pilot vessels on the Mississippi River between New Orleans, Louisiana and Pilottown, Louisiana and within the Port of New Orleans between Southport and Meraux-ville; within the Industrial Canal, between the Mississippi River to and including Lake Pontchartrain; within the Intracoastal Canal, between the Industrial Canal and the turning basin at Michoud, inclusive; also for the Mississippi River Gulf Outlet between the Industrial Canal and Mile 28.3, the Gulf Intracoastal Waterway from the Louisiana-Mississippi state line to the Mississippi River Gulf Outlet, including Michoud Slip and Michoud Canal, Chef Pass, Algiers Cutoff, and the Harvey Canal; the Venice Jump within six and one-half miles of the Mississippi River, Bayou Sauvage; and Bayou Liberty.

B. However, nothing herein contained shall prevent an exchange of river port pilots at what is known as "Quarantine Anchorage" or "The Point" or "General Anchorage" between the river port pilots herein named and pilots engaged in the piloting of vessels above Southport, nor shall anything herein provided prevent pilots engaging in piloting vessels above Southport from ending or beginning the pilotage from any wharf or "The Point" or "General Anchorage" in the Harbor of New Orleans.

R.S. 34:997. Pilotage fees; vessel subject to pilotage

A. The river port pilots shall be entitled to ask for and to receive a fee for their pilotage services.

B. The fees for pilotage services shall be established in accordance with R.S. 34:1121, *et seq.*

C. The river port pilots shall also be entitled to enter into agreements with the masters, owners, or their agents, of ships and vessels, not otherwise subject to compulsory pilotage as provided by these statutes, for special services, boats, equipment, transportation, and other necessary fees at such rates and for such sums as may be agreed between them, but not to exceed those rates established in accordance with R.S. 34:1121, *et seq.*

D. All vessels shall employ a river port pilot when navigating the operating territory described in this Subpart except those vessels exempted by the laws of the United States or vessels of one hundred gross tons or less.

E. In case of refusal to take such river port pilot, the master, owner, agent, or consignee of any vessel required to employ a river port pilot shall pay the established pilot fee as if a river port pilot had been employed.

R.S. 34:1002. Violations and penalties

Anyone attempting to exercise the functions herein vested in the said river port pilots, who has not been commissioned by the governor, shall be fined not less than one thousand five hundred dollars, nor more than five thousand dollars, or imprisoned not less than thirty days, nor more than four months, or both, at the discretion of the court in whose jurisdiction the offense is committed.

R.S. 34:1002.1. Employing pilot without a state commission; penalties

A. No master, owner, or agent of a vessel required under this Subpart to take a state commissioned river port pilot shall perform the duties of a river port pilot nor employ a person who is not a state commissioned river port pilot.

B. Whoever violates this Section shall be fined not less than one thousand five hundred dollars nor more than

five thousand dollars, or imprisoned for not more than six months, or both.

R.S. 34:1009. Employing pilot without a commission; liability of vessel, master, and owner

A vessel which is required to use a river port pilot pursuant to this Subpart and fails to do so when a river port pilot offers his services, the vessel, its captain, and owners shall be liable for a civil penalty and shall forfeit to the state of Louisiana the sum of fifteen thousand dollars, with privilege on the vessel, to be recovered before any court of competent jurisdiction. An action for forfeiture under this Section may be brought by the attorney general of the state of Louisiana or by the Board of River Port Pilot Commissioners. If a judgment is obtained hereunder, the court shall include in its judgment an award for reasonable attorney fees and costs incurred in connection with the prosecution of such action.

R.S. 34:1121. Pilotage fee commissions; composition

A. A separate pilotage fee commission shall exist relative to each pilot association established and operating under state law. Each pilotage fee commission shall be nominally designated by the name of the association to which it relates, followed by "Fee Commission".

R.S. 34:1122. Fees and charges; adjudication of disputes

A. (1) Each fee commission shall have exclusive authority to fix and establish reasonable and just fees and rates for:

(a) Pilotage service to ships and vessels.

* * * *